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SHANE D. MOSLEY, SR.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SHANE D. MOSLEY, SR.,

Plaintiff,

vs.

VICTOR CONTE,

Defendant.

08-Civ-1777 (JSW)

PLAINTIFF'S ADMINISTRATIVE MOTION
TO SHORTEN THE DEADLINES SET
FORTH IN THE ORDER SETTING INITIAL
CASE MANAGEMENT CONFERENCE AND
FOR EXPEDITED DISCOVERY

Date: April 29, 2008
Time: 10:00 a.m.
Courtroom:

Hon. Jeffrey S. White

1 **I. INTRODUCTION**

2 Plaintiff Shane D. Mosley, Sr. ("Mosley" or "Plaintiff") respectfully submits this
3 Memorandum of Points and Authorities in support of his motion: (i) pursuant to Northern District
4 of California's Civil Local Rule 7-11 ("Local Rule 7-11") to shorten the deadlines set forth in the
5 Order Setting Initial Case Management Conference; with (ii) a concomitant leave to conduct
6 expedited discovery; and (iii) such other and further relief as this Court deems just and proper.

7 For the reasons more fully discussed in the Burstein Dec. at ¶ 4, pursuant to Local Rule 7-11's
8 express terms, this motion is to be deemed fully submitted on Monday, May 5, 2008, without a
9 hearing. Nonetheless, due to the importance of the issues raised herein, Plaintiff respectfully
10 requests oral argument on this motion during the week of May 5, 2008, if the Court's schedule will
11 allow it.¹ The matter is urgent, because if the Court does not grant an expedited trial² in this case,
12 Mosley will of necessity be denied a significant portion of the ultimate relief sued for herein.

13 **II. PRELIMINARY STATEMENT**

14 In the Complaint, dated April 2, 2008 (the "Complaint"), Mosley, a legendary professional
15 boxer, asserts that he has been defamed on multiple occasions by defendant Victor Conte ("Conte"
16 or "Defendant"), the infamous principal of the Bay Area Laboratory Co-operative ("Balco"). *See*
17 Exhibit B a true and accurate copy of the Complaint. (All Exhibits referenced herein are annexed
18 to the Burstein Dec.) Essentially, Conte has falsely stated that Mosley knowingly used banned or
19 illegal performance enhancing substances. Such defamatory statements have already been published

20
21 ¹ Pursuant to the Court's Standing Order, Plaintiff has referenced the Court's website
22 which identifies July 11, 2008 as the earliest date for a hearing in this case. A July 11 hearing would
23 render much of the relief sought herein moot. Accordingly, if the Court is unable to hear argument
24 during the week of May 5th, Plaintiff respectfully withdraws any request for oral argument, and
instead asks that this application be deemed submitted on Monday, May 5, 2008, consistent with the
timing requirements contained in Local Rule 7-11.

25 ² Notably, Plaintiff anticipates that trial of this matter would only require one week of
26 full trial days, or approximately two weeks, in view of this Court's policy of sitting for trial on
27 Mondays through Thursdays from 8:30 a.m. to 1:30 p.m. (*See* the accompanying Declaration of Judd
Burstein, dated April 28, 2008 ["Burstein Dec."], ¶ 5, n.2).

1 by Conte in, *inter alia*, the *New York Daily News* ("Daily News"). (See Ex. C, a true and complete
2 copy of a *Daily News* Article, dated March 30, 2008, which reports Conte as stating that he watched,
3 *inter alia*, Mosley "inject himself," and that Mosley knew "precisely what [he] was using.").

4 Moreover, Conte has told reporters that he is currently writing a book, which is scheduled
5 to be published in September 2008, in which Conte intends to republish his defamatory statements
6 about Mosley to a national audience (the "September 2008 Publication"). *Id.* Hence, while Conte's
7 defamatory publications in the *Daily News* have already caused significant damage to Mosley's
8 reputation, the *Daily News* is a regional paper. The national publication of the defamatory
9 statements in a highly publicized book authored by the infamous Conte will do far greater and
10 irreversible damage to Mosley's reputation. (See Burstein Dec. at ¶ 7).

11 Accordingly, this case presents a unique situation whereby a Plaintiff knows that a Defendant
12 intends to disseminate allegedly defamatory publications on a wide scale several months in the
13 future. Mosley thus brings this motion in an attempt to avoid First Amendment concerns relating
14 to the prior restraint of speech. If Mosley can successfully establish that Defendant's statements are
15 defamatory, the Court is empowered to enjoin Conte from repeating and republishing them,
16 including, in particular, the anticipated September 2008 Publication. (See discussion *infra*).

17 **III. STATEMENT OF RELEVANT FACTUAL BACKGROUND**

18 Due to the page limitations for this motion, in addition to the summary set forth in the
19 Preliminary Statement above, Mosley respectfully refers the Court to the Complaint for a complete
20 recitation of the facts.

21 **IV. RELEVANT PROCEDURAL HISTORY**

22 Mosley filed the Complaint, dated April 2, 2008, seeking, *inter alia*, damages and a
23 permanent injunction against Conte for his past and continued defamatory statements relating to
24 Mosley's alleged knowing use of any illegal or banned substances. On or about April 2, 2008, the
25 United States Magistrate Judge Bernard Zimmerman was assigned to the case and issued an Order
26 Setting Initial Case Management Conference and ADR Deadlines ("Scheduling Order"). The
27

Scheduling Order set the following deadlines: (i) June 23, 2008, as the last day to meet and confer for, *inter alia*, initial disclosures, ADR process selection and set a discovery plan; (ii) July 7, 2008, as the last day to file Rule 26(f) Report, complete initial disclosures or state objections in the Rule 26(f) Report and file a Case Management Statement; and (iii) July 14, 2008, as the date for the Initial Case Management Conference.

On April 18, 2008, Counsel for Plaintiff wrote Conte's counsel seeking consent to the relief sought herein. In a writing dated April 22, 2008, Conte's counsel declined to consent; consequently no Local Rule 7-11 stipulation accompanies this motion. (Exhibit E is a true and complete copy of both the April 18th writing and the April 22nd response). On April 23, 2008, counsel for the parties filed a stipulation extending Conte's time to answer, without prejudice to the relief sought herein. See Docket Entry No. 11. On April 23, 2008, Conte filed a declination to proceed before United States Magistrate Judge Zimmerman. See Docket Entry No. 12. In an Order filed on April 25, 2008, this case was reassigned to Hon. Jeffrey S. White. Docket Entry No. 15.

V. ARGUMENT

A. Mosley Seeks to Shorten the Deadlines Set Forth in the Scheduling Order

Essentially a catch-all for various administrative relief, Local Rule 7-11 "recognizes that during the course of case proceedings a party may require a Court order with respect to miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or local rule or standing order of the assigned judge."³ This is such a case. In this regard, "[d]istrict courts have an inherent power to control their dockets." *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006) (citation omitted).

Mosley seeks to shorten the deadlines set forth in the Scheduling Order as follows: (i) **May 12, 2008**, as the last day to meet and confer for, *inter alia*, initial disclosures, ADR process selection

³ See also *Excelligence Learning Corp. v. Oriental Trading Co., Inc.*, No. C-03-4947, 2004 WL 2452830, at *2 (N.D.Cal. Mar. 22, 2004) ("For the reasons discussed on the record, the Court will grant in part Excelligence's motion for an expedited schedule.").

1 and set a discovery plan; (ii) **May 19, 2008** as the last day to file the Rule 26(f) Report, complete
 2 initial disclosures or state objections in the Rule 26(f) Report and file a Case Management
 3 Statement; and (iii) **May 30, 2008** as the date for the Initial Case Management Conference, or as
 4 soon thereafter as is convenient to the Court. Mosley has good cause for requesting the shortening
 5 of these deadlines. The shortened deadlines are designed to allow Mosley to go forward with an
 6 expedited trial on his claims of slander⁴ and libel⁵, which he has pled in compliance with
 7 Cal.Civ.Code §§ 45 and 46. *See* the Complaint at ¶¶ 11-42.

8 If the Court's schedule allows, the shortening of these deadlines will make it possible for
 9 Plaintiff to go forward with an expedited trial in July or August 2008, of *inter alia*, Mosley's claims
 10 for damages as well as a permanent injunction restraining Conte from publishing the September
 11 2008 Publication. Important here, California's Supreme Court held in *Balboa Island Village Inn, Inc.*
 12 *v. Lemen*, that a permanent injunction against speech judicially determined to be defamatory is **not**
 13 an unconstitutional prior restraint under either the Constitution of the United States or California.
 14 40 Cal.4th 1141, 1155, 1160, 156 P.3d 339, 349, 352, 57 Cal.Rptr.3d 320, 331, 335 (Cal. 2007):

15 [F]ollowing a trial at which it is determined that the defendant defamed the plaintiff,
 16 the court may issue an injunction prohibiting the defendant from repeating the
 17 statements determined to be defamatory * * * Despite the broad language in the
 18 California Constitution protecting speech, we have recognized that a court may
 19 enjoin further distribution of a publication that was found at trial to be unlawful....

20 Accordingly, Mosley does not seek to preliminarily enjoin Conte from publishing the book
 21 with the defamatory statements. Rather, Mosley seeks, pursuant to *Balboa Island*, to have an

22 ⁴ As set forth in the Complaint at ¶¶ 12, 13, and 24, Conte spoke to reporters for the
 23 *New York Daily News* and a reporter for *USA Today* and falsely stated, with actual malice, to the
 24 reporters that he "watched [Mosley] inject [himself] in front of me," that Mosley "knew precisely
 25 what [he was] using," and that, notwithstanding Mosley's prior public claim that Conte had misled
 26 Mosley about the legality of the products provided by Conte, "[i]t was all explained up front and
 27 there was no deception." (Complaint at ¶ 12).

28 ⁵ As set forth in the Complaint at ¶ 34, in September of 2007, Conte sent an e-mail to
 a reporter affiliated with SI.com falsely stating with actual malice, in words and substance, that he
 had explained to Mosley that he (Conte) was providing him with illegal steroids and performance
 enhancing substances. Complaint at ¶ 34.

1 expedited trial on the merits to prove the statements are defamatory, and then to permanently enjoin
 2 Conte from continuing to repeat the defamatory statements.

3 **B. The Court Should Grant Expedited Discovery**

4 This Court may grant expedited discovery "for good cause shown."⁶ Mosley requests
 5 permission to begin discovery immediately, prior to the Rule 26(f) conference. As set forth *supra*,
 6 Mosley has established good cause, because he is properly seeking an expedited trial of this matter.

7 **VI. CONCLUSION**

8 Based upon the foregoing, Plaintiff respectfully requests that the Court grant Mosley's motion
 9 (i) to shorten the deadlines set forth in the Order Setting Initial Case Management Conference; (ii)
 10 for leave to conduct expedited discovery prior to conferring with opposing counsel and prior to the
 11 Initial case Management Conference; with (iii) such other and further relief as this Court deems just
 12 and proper.

13 Dated: San Francisco, California
 14 April 29, 2008

JUDD BURSTEIN, P.C.

By _____

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 26 ⁶ *In re Countrywide Financial Corp. Derivative Litigation*, Nos. CV-07-06923,
 27 CV-07-05295, 2008 WL 852638, at *13 (C.D.Cal. Mar. 28, 2008).